

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN COREY JACOBSON,

Defendant-Appellant.

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UNPUBLISHED

April 26, 2007

No. 269297

Oakland Circuit Court

LC No. 2005-204549-FH

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of manufacturing marijuana, MCL 333.7401(2)(d)(ii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

During a search of defendant's home, police officers found marijuana plants in the living room and in a bedroom. The bedroom also contained two hunting rifles and a shotgun, all of which were stored in gun cases and were unloaded. Four shotgun shells were in the same case as the shotgun. Defendant testified that he purchased the guns exclusively for hunting, and stated that he had not used two of the guns for several years. On cross-examination, defendant maintained that he stored the guns in the bedroom because the basement was too musty. Defendant's brothers testified that defendant used the weapons only for hunting.

During closing argument, the prosecutor argued that defendant did not have to possess or use the guns for an unlawful purpose to be guilty of felony-firearm, and that defendant kept the guns close to the "crop" in order to protect his marijuana. Defense counsel responded by arguing that the prosecutor had overcharged defendant. Counsel maintained that the location of the guns and their unloaded condition supported a finding that defendant did not possess the firearms, but that they were simply stored in the same room as some of the marijuana plants. Counsel further argued that merely owning the guns did not equate to "possession" of them during the commission of the felony of growing marijuana. Defense counsel also specifically argued that the guns were not "used" during the commission of the felony. During rebuttal, the prosecutor responded by arguing that the jury should not agree with defense counsel's apparent attempt to create sympathy for defendant, and should not disregard the oath they had taken.

Defendant argues that the prosecutor's comments during rebuttal were improper, and denigrated defense counsel. We disagree.

We review claims of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test is whether the prosecutor's alleged misconduct denied defendant a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We review allegations of prosecutorial misconduct on a case-by-case basis and examine the pertinent portion of the record to evaluate a prosecutor's remarks in context, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), and in light of all the facts. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). A prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.* Otherwise improper remarks by a prosecutor might not require reversal if made in response to issues the defense has raised. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

After reviewing the challenged comments, we find that the prosecutor did not improperly denigrate defense counsel by arguing that counsel's argument did not reflect the elements the prosecution had to prove in order to support a felony-firearm conviction. In a prosecution for felony-firearm, the prosecutor must prove that the defendant possessed a firearm during the commission or attempted commission of a felony. MCL 750.227b(1); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Possession of a weapon may be actual or constructive, and may be proved by circumstantial as well as direct evidence. *People v Hill*, 433 Mich 464, 469-470; 446 NW2d 140 (1989). Actual use of the firearm is not necessary to support the conviction. Here, the prosecutor claimed that the placement of the guns so close to the marijuana supported a finding of constructive possession, while defense counsel argued that constructive possession was not shown because defendant did not "use" the weapons for anything other than hunting. In context, the prosecutor's rebuttal argument was designed to support her position rather than to denigrate defense counsel.

Defense counsel was in effect arguing for jury nullification along with his claim that defendant did not "possess" the firearm during the commission of the underlying felony. Jury nullification is the power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence. *People v St Cyr*, 129 Mich App 471, 473-474; 341 NW2d 533 (1983). However, this is a de facto power with regard to which the jury is not instructed, *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997), and it is not a recognized defense that a defendant is entitled to present. *People v Bailey*, 451 Mich 657, 671 n 10; 549 NW2d 325 (1996); *People v Demers*, 195 Mich App 205, 206-208; 489 NW2d 173 (1992). Thus, it was not improper for the prosecutor to respond to defendant's arguments and state that the jury should not use this unrecognized defense as a reason for acquittal.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Stephen L. Borrello